IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 19

UNIVERSAL INTERPRETIVE SHUTTLE CORPORATION
Petitioner,
v.
WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

JEFFREY L. NAGIN
ALLEN E. SUSMAN
9601 Wilshire Boulevard
Beverly Hills, California 90210

RALPH S. CUNNINGHAM, JR.
THOMAS P. MEEHAN
1815 H Street, N. W.
Washington, D. C. 20006

Attorneys for Petitioner

Of Counsel:

ROSENFELD, MEYER & SUSMAN
9601 Wilshire Boulevard
Beverly Hills,
California 90210

ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1815 H Street, N. W.
Washington, D. C. 20006

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ARGUMENT

One theme prevailing throughout the briefs of both Respondents invites initial comment. Respondents assert that the certification authority of the Washington Metropolitan Area Transit Commission (WMATC) will be exercised in a spirit of comity and will not divest the Secretary of the Interior of any significant authority over the Mall area. This assertion has no support in reason or in fact. The certification authority

of WMATC, if invoked, would be pervasive. (See *Montgomery Charter Service, Inc.* v. *Washington Metropolitan Area Transit Commission,* 325 F.2d 230, 234 (D.C. Cir. 1963). WMATC would seek to regulate the very matters that the Secretary has placed within his province in his contract with petitioner. (App. 67-87). As a practical matter, if WMATC chooses to defer consistently to the decisions of the Secretary then WMATC certification would be unnecessary; if WMATC seeks to contravene decisions of the Secretary then the Secretary's policies governing the National Parks would be frustrated.

1. Respondent D. C. Transit System Inc. (D. C. Transit) in its brief advances the argument that the District of Columbia Public Utilities Commission (PUC), whose authority to regulate transportation within the District of Columbia was transferred to Respondent Washington Metropolitan Area Transit Commission, acquired regulatory authority in National Park areas by the Act of February 27, 1931, 46 Stat. 1424, 1426, D. C. Code § 40-603(e).[1] This assertion flies in the face of the express reservation of exclusive jurisdiction over the National Park lands in the predecessor of the National Park Service continued from the Act of March 3, 1925, 43 Stat. 1119, 1126, D. C. Code § 40-613.

The 1931 Act was an amendment of selected provisions of the 1925 Act. See H. R. Rep. No. 2323, 71st Cong., 3d Sess., accompanying H. R. 14922 (January 21, 1931), entitled "To amend traffic acts approved March 3, 1925 and July 3, 1926, etc.," particularly at pp. 5-6. An amendatory act, by established rules of

[1] D. C. Transit Br. 15-16.

statutory construction, includes by reference the reservations of the amended legislation not inconsistent with the amendment. 1 Sutherland, *Statutory Construction*, 3d ed., §§ 1934, 1935; As this Court stated in *Markham* v. *Cabell*, 326 U.S. 404, 411 (1945):

> ". . . the normal assumption is that where Congress amends only one section of the law leaving another untouched, the two were designed to function as parts of an integrated whole."

In this instance there is no indication that Congress intended to limit or impair the jurisdictional exception for the Park lands in the 1925 Act (D.C. Code § 40-613) by means of the 1931 amendment now codified as D. C. Code § 40-603(e).

2. WMATC, at pages 10 and 12-13 of its brief, argues in essence that since certain activities exempt from ICC regulation by reason of 49 U.S.C. § 303(b) were expressly exempted from WMATC regulation in the Compact, those § 303(b) activities not expressly exempted in its Compact were not intended to be exempted from regulation by WMATC. In support of this contention WMATC points out that it presently regulates certain types of transportation exempted from ICC regulation in 49 U.S.C. § 303(b). From this WMATC concludes that since the exemption in § 303(b)(4) for transportation within National Parks under authorization of the Secretary was not specifically carried forward into the Compact, such activity is subject to the regulation of WMATC.

This convoluted argument ignores a number of critical facts. First, WMATC acceded to the regulatory authority not only of the ICC but also of the Public Utilities Commission of the District of Columbia (PUC). Significantly, the PUC regulated types of

transportation within the District of Columbia which were specifically exempted from ICC regulation in 49 U.S.C. § 303(b).[2] Thus, WMATC's regulatory authority over certain activities specifically exempt from ICC regulation in 49 U.S.C. § 303(b) is merely the result of its acceding to the authority of the PUC and is not support for the contention of WMATC that the exemption in 49 U.S.C. § 303(b)(4) should be ignored because it was not specifically carried forward into the Compact.

Moreover, even assuming, *arguendo*, that all the exemptions in 49 U.S.C. § 303(b) were suspended in the Consent legislation of the Compact and WMATC thereby was granted new jurisdiction over some types of transportation, this would not be sufficient to confer upon WMATC jurisdiction over transportation within National Parks. The Secretary is relying upon more specific authority than the exemptions in 49 U.S.C. §§ 303(b)(4) and 309(a) to regulate activities in the National Parks. He has affirmatively been granted exclusive jurisdiction over the National Parks in the District of Columbia, and only express, affirmative action by Congress can impair his jurisdiction over those National Parks. D. C. Code §§ 8-108, 8-144; 16 U.S.C. §§ 1-3.

The correct analysis of the Compact and the Congressional legislation consenting to it clearly indicates

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[2] Under the Act of March 4, 1913, 37 Stat. 975, as amended, D. C. Code § 43-111, the PUC was granted jurisdiction over "common carriers" which were defined to include:

> "every . . . person . . . owning, operating, controlling, or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire."

that WMATC has no jurisdiction over the interpretive service proposed by the Secretary:

(a) Article VIII of the Compact (Pet. Br. 16a) provides that the Compact will not become effective until Congress grants WMATC jurisdiction and suspends the application of laws of the United States and the District of Columbia inconsistent with or duplicative of the provisions of the Compact.

(b) As shown in H. R. Rep. No. 1621, 86th Cong., 2d Sess. 29-30 (1960) (Pet. Br. 49a-50a), Congress, in Section 3 of the Consent legislation, 74 Stat. 1031, 1050, D. C. Code § 1-1412, granted jurisdiction over transportation activities in the area previously held by the ICC and the PUC and suspended specified provisions of the Interstate Commerce Act and the District of Columbia Code applicable to those agencies.

(c) Neither the ICC nor PUC had jurisdiction over National parks. Indeed, transportation activities in the National parks in the District of Columbia were and are expressly exempted from regulation by the ICC by reason of 49 U.S.C. §§ 303(b)(4) and 309(a)(1), and D. C. Code § 8-108, and from regulation by PUC by reason of D. C. Code §§ 8-108, 8-144 and 40-613. Thus, WMATC did not fall heir to any jurisdiction over National parks in the District from either ICC or PUC.

(d) Neither the Compact nor the Consent legislation by Congress contain any new, affirmative grant of jurisdiction over National parks to WMATC.

(e) None of the laws vesting exclusive jurisdiction over the National Parks in the District of Columbia in the Secretary of the Interior and his deputy, the Director of the National Park Service, including

49 U.S.C. §§ 303(b)(4) and 309(a), are inconsistent with or duplicative of the provisions of the Compact. Thus, WMATC cannot be said to have acquired any jurisdiction over the National Parks by reason of the suspension of laws provision of the Congressional legislation consenting to the Compact.

(f) A transfer of jurisdiction from an existing Federal regulatory agency to a new agency is never implied, particularly where the new agency is parochial in character. See *e.g., United States* v. *Wittek,* 337 U.S. 346 (1949).

(g) Therefore WMATC has no power to regulate activities taking place within National Parks of the District of Columbia which are within the exclusive jurisdiction of the Secretary.

3. There is no rational basis for the contention of D. C. Transit that the Secretary lacks authority to provide an interpretive shuttle service on the Mall and, *a priori,* authority to procure preformance of such services by means of a concession contract.[3]

The National park lands in the District of Columbia are Federal property. Within these enclaves the United States exercises both the police powers of the state and the proprietary powers of a sovereign owner. *Robbins* v. *United States,* 284 Fed. 39, 45 (8th Cir. 1922). In the 1916 Act creating the National Park Service, Congress delegated full measure of authority over park lands to the Secretary. 16 U.S.C. §§ 1-3. The authority so conferred surely includes the power to provide an interpretive shuttle service for visitors

[3] D. C. Transit Br. 25-29.

to the National Parks.[4] In providing such a service the Secretary may either utilize his own equipment and personnel or utilize a concessioner. See *United States* v. *Gray Line Water Tours of Charleston*, 311 F.2d 779, 781 (4th Cir. 1962).

D. C. Transit completely misconveives the purpose and scope of the Act of August 8, 1953, 67 Stat. 495, 16 U.S.C. § 1b. The purpose of that Act was not to authorize the Secretary to conduct a for-hire transportation service wholly within Carlsbad Caverns National Park for visitors (a power he already had) but to authorize the Secretary to transport his employees from the park to their residences *outside* the park. The Carlsbad example is of no relevance here where the Secretary proposes a service to be operated wholly within a National Park enclave which is under his exclusive jurisdiction.

Parenthetically it should be noted that Respondent D. C. Transit and Respondent WMATC have taken opposing views as to the Secretary's power to operate the proposed service himself. WMATC has repeatedly conceded that the Secretary could operate the service and that his operations would be exempt from WMATC regulation.[5]

4. The District Court in its opinion held that even if the interpretive service to be performed by peti-

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[4] D. C. Transit at p. 34, f.n. 16 of its brief refers to a preliminary injunction granted by the United States District Court for the District of Columbia in *D. C. Transit System, Inc.* v. *Udall*, Civil No. 1122-68 on May 27, 1968. On appeal the U. S. Court of Appeals for the District of Columbia reversed the District Court and on remand the District Court dismissed the action.

[5] See, *e.g.*, WMATC Br. 25.

tioner for the Secretary was "transportation", it was nevertheless exempt from regulation by WMATC because it came within the "transportation by the Federal Government" exemption contained in Article XII, Section 1(a) of the Compact (Pet. Br. 18a). In contending against this position Respondent WMATC places its reliance upon authorities which are grossly inapposite.[6]

WMATC places its chief reliance upon *U. S. A. C. Transport, Inc.* v. *United States*, 203 F.2d 878, 879 (10th Cir. 1953), *cert. denied*, 345 U.S. 997 (1953). In that case the Court held that a carrier transporting goods for the U. S. Government over public highways outside Federal enclaves was not exempt from the requirement to obtain a certificate of public convenience and necessity from the ICC.

Here, however, the service to be provided by Petitioner is within the proprietory powers of the United States and the regulatory authority vested in the Secretary. The proposed service is not a service to the United States, such as was performed in the *U. S. A. C. Transport* case, but a service for and on behalf of the United States to its beneficiaries; it is the very service that the United States would otherwise perform for such beneficiaries itself.

In the portion of the *U. S. A. C. Transport* opinion quoted by WMATC the Court expressly noted that the activities which were the subject of that case did not fall within any of the exemptions set forth in 49 U.S.C. § 303(b). Here the services of Petitioner would be exempt by reason of § 303(b)(4).

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[6] WMATC Br. 22-27.

If the services of Petitioner constitute "transportation" then clearly such transportation is "transportation by the Federal Government" within the meaning of the Compact.

5. Respondent D. C. Transit overreaches in its description of the scope of the protection from competition granted it in Section 3 of its Franchise. Act of July 24, 1956, 70 Stat. 598 (Pet. Br. 37a-38a). Section 3 provides that "no *competitive* . . . bus line . . . for the transportation of passengers of the character *which runs over a given route on a fixed schedule* shall be established . . . without the prior issuance of a certificate by [WMATC] to the effect that the competitive line is necessary for the convenience of the public." (Emphasis added) Transit points out some significant distinctions between regular route and irregular route operations at page 36 of its brief. These distinctions indicate, and apparently Transit concedes,[7] that even if the proposed interpretive service were subject to WMATC certification requirements it could not be described as a regular route operation because (a) although petitioner may operate according to prearranged schedules, such schedules may be varied without WMATC approval, and (b) although petitioner may generally follow an established route, such routes may be varied without WMATC approval.

The case of *Bingler Vacation Tours* v. *United States*, 132 F. Supp. 793 (D.N.J., 1955), *affirmed*, 350 U.S. 921 (1955), cited by D. C. Transit at page 36 of its brief,

[7] On page 34 of its brief Transit states that the proposed service will duplicate its irregular route sightseeing service but thereafter inconsistently contends that the proposed service should be treated as a "regular route" operation.

provides strong support for the holding of the District Court below regarding the limited scope of the protection afforded D. C. Transit in § 3 of its Franchise. In *Bingler,* the court explains that "regular route" transportation involves expeditious passenger transportation between two points whereas irregular route transportation must include "something substantial" in addition to "bare expeditious transportation" between two points. 132 F. Supp. at 795. The proposed service is an interpretive tour of the central Mall area at a speed not to exceed ten miles an hour. The interpretations to be presented by bilingual guides are "something substantial" in addition to bare transportation. Passage in an articulated tram proceeding through the Mall at a maximum speed of ten miles an hour cannot be considered expeditious transportation. In this context the proposed service must be found to be an "irregular route."

Moreover, the language of *Bingler* clearly supports the District Court's finding that the phrase "over a given route on a fixed schedule" is descriptive of a regular route operation, and, therefore, the protection

of § 3 of Transit's franchise is limited to Transit's regular route operations.

Respectfully submitted,

JEFFREY L. NAGIN
ALLEN E. SUSMAN
9601 Wilshire Boulevard
Beverly Hills, California 90210

RALPH S. CUNNINGHAM, JR.
THOMAS P. MEEHAN
1815 H Street, N. W.
Washington, D. C. 20006

Of Counsel: *Attorneys for Petitioner*

ROSENFELD, MEYER & SUSMAN
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